STATE OF MICHIGAN

COURT OF APPEALS

KVAERNER U.S., INC. a/k/a BROWN MACHINE DIVISION, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED January 26, 2001
v GARY L. MINARIK, Defendant/Counter-Plaintiff-Appellant.	No. 216550 Oakland Circuit Court LC No. 98-000275-CK

Before: Markey, P.J., and Whitbeck and J.L. Martlew*, JJ.

PER CURIAM.

Defendant appeals by right from a judgment in favor of plaintiff entered after the trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff hired defendant under a written offer of employment. The contract provided that plaintiff would reimburse defendant for certain relocation expenses. It further provided that the company had "the right to retrieve these relocation reimbursements" in full should defendant voluntarily terminate his employment within the first year. Defendant tendered his resignation after five months, and plaintiff filed this action to recover the relocation expenses. The court found that defendant had voluntarily left his job and entered judgment in plaintiff's favor.

Although defendant disputed the terms of the contract below, he has not raised that issue on appeal. His sole claim is that, assuming the contract does require him to repay the relocation expenses, plaintiff is not entitled to sue him because it committed the first breach of the contract in that it hired him as a manger but gave him nonmanagerial duties.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must

* Circuit judge, sitting on the Court of Appeals by assignment.

consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

It is well established "that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). "However, that rule only applies when the initial breach is substantial." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A substantial breach is one that "has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted).

Assuming plaintiff did breach the contract by failing to give defendant duties commensurate with his position, such a breach is not so substantial that it barred plaintiff's suit. Plaintiff employed defendant as agreed and paid him the manager's salary specified in the contract. Defendant's performance under the agreement was not rendered impossible or ineffective by the fact that he did not like the duties plaintiff asked him to perform. Therefore, plaintiff was not precluded from suing defendant for his breach of the contract. Without any additional challenge to the trial court's decision to grant summary disposition to plaintiff, we see no error in the trial court's decision to enter judgment in plaintiff's favor.

We affirm.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew